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APPLICATION NO.	FILING DATE	FIRST NAMED INVENTOR	ATTORNEY DOCKET NO.	CONFIRMATION NO.
09/661,171	09/13/2000	Christopher D. Barr	66688	7502

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EXAMINER

MADSEN, ROBERT A

ART UNIT

PAPER NUMBER

1761

DATE MAILED: 03/28/2002

Please find below and/or attached an Office communication concerning this application or proceeding.

Office Action Summary

Application No.

09/661,171

Applicant(s)

BARR ET AL.

Examiner

Robert Madsen

Art Unit

1761

AS-8

-- The MAILING DATE of this communication appears on the cover sheet with the correspondence address --
Period for Reply

A SHORTENED STATUTORY PERIOD FOR REPLY IS SET TO EXPIRE 3 MONTH(S) FROM THE MAILING DATE OF THIS COMMUNICATION.

- Extensions of time may be available under the provisions of 37 CFR 1.136(a). In no event, however, may a reply be timely filed after SIX (6) MONTHS from the mailing date of this communication.
- If the period for reply specified above is less than thirty (30) days, a reply within the statutory minimum of thirty (30) days will be considered timely.
- If NO period for reply is specified above, the maximum statutory period will apply and will expire SIX (6) MONTHS from the mailing date of this communication.
- Failure to reply within the set or extended period for reply will, by statute, cause the application to become ABANDONED (35 U.S.C. § 133).
- Any reply received by the Office later than three months after the mailing date of this communication, even if timely filed, may reduce any earned patent term adjustment. See 37 CFR 1.704(b).

Status

- 1) ☐ Responsive to communication(s) filed on ____.
- 2a) ☐ This action is FINAL. 2b) ☒ This action is non-final.
- 3) ☐ Since this application is in condition for allowance except for formal matters, prosecution as to the merits is closed in accordance with the practice under *Ex parte Quayle*, 1935 C.D. 11, 453 O.G. 213.

Disposition of Claims

- 4) ☒ Claim(s) 1-18 is/are pending in the application.
- 4a) Of the above claim(s) 1-6 and 10-18 is/are withdrawn from consideration.
- 5) ☐ Claim(s) ____ is/are allowed.
- 6) ☒ Claim(s) 7-9 is/are rejected.
- 7) ☐ Claim(s) ____ is/are objected to.
- 8) ☐ Claim(s) ____ are subject to restriction and/or election requirement.

Application Papers

- 9) ☐ The specification is objected to by the Examiner.
- 10) ☐ The drawing(s) filed on ____ is/are: a) ☐ accepted or b) ☐ objected to by the Examiner.
Applicant may not request that any objection to the drawing(s) be held in abeyance. See 37 CFR 1.85(a).
- 11) ☐ The proposed drawing correction filed on ____ is: a) ☐ approved b) ☐ disapproved by the Examiner.
If approved, corrected drawings are required in reply to this Office action.
- 12) ☐ The oath or declaration is objected to by the Examiner.

Priority under 35 U.S.C. §§ 119 and 120

- 13) ☐ Acknowledgment is made of a claim for foreign priority under 35 U.S.C. § 119(a)-(d) or (f).
a) ☐ All b) ☐ Some * c) ☐ None of:
1. ☐ Certified copies of the priority documents have been received.
2. ☐ Certified copies of the priority documents have been received in Application No. ____.
3. ☐ Copies of the certified copies of the priority documents have been received in this National Stage application from the International Bureau (PCT Rule 17.2(a)).
* See the attached detailed Office action for a list of the certified copies not received.
- 14) ☐ Acknowledgment is made of a claim for domestic priority under 35 U.S.C. § 119(e) (to a provisional application).
a) ☐ The translation of the foreign language provisional application has been received.
- 15) ☐ Acknowledgment is made of a claim for domestic priority under 35 U.S.C. §§ 120 and/or 121.

Attachment(s)

- 1) ☒ Notice of References Cited (PTO-892)
- 2) ☐ Notice of Draftsperson's Patent Drawing Review (PTO-948)
- 3) ☒ Information Disclosure Statement(s) (PTO-1449) Paper No(s) 6.
- 4) ☐ Interview Summary (PTO-413) Paper No(s) ____.
- 5) ☐ Notice of Informal Patent Application (PTO-152)
- 6) ☐ Other: _____

DETAILED ACTION

Election/Restrictions

Restriction to one of the following inventions is required under 35 U.S.C. 121:

- I. Claims 1-6,10-18, drawn to a food container, classified in class 426 subclass 115.
- II. Claim 7-9, drawn to a method of packaging food in a container, classified in class 426, subclass 394.

The inventions are distinct, each from the other because:

Inventions II and I are related as process of making and product made. The inventions are distinct if either or both of the following can be shown: (1) that the process as claimed can be used to make other and materially different product or (2) that the product as claimed can be made by another and materially different process (MPEP § 806.05(f)). In the instant case the container of invention I can be made by a materially different process than Invention II. For example, the food can be placed on a flat container blank and the container blank is folded around the food to obtain the container of Invention I.

Because these inventions are distinct for the reasons given above and have acquired a separate status in the art because of their recognized divergent subject matter, restriction for examination purposes as indicated is proper.

During a telephone conversation with Pamela Stewart on March 13, 2002 a provisional election was made with traverse to prosecute invention II claims 7-9. Affirmation of this election must be made by applicant in replying to this Office action.

Claims 1-6, 10-18 are withdrawn from further consideration by the examiner, 37 CFR 1.142(b), as being drawn to a non-elected invention.

Drawings

The drawings are objected to as failing to comply with 37 CFR 1.84(p)(5) because they do not include the following reference sign(s) mentioned in the description: first side flap 96 of the bottom wall. Applicant is required to submit a proposed drawing correction in reply to this Office action. However, formal correction of the noted defect may be deferred until after the examiner has considered the proposed drawing correction.

Claim Rejections - 35 USC § 112

The following is a quotation of the first paragraph of 35 U.S.C. 112:

The specification shall contain a written description of the invention, and of the manner and process of making and using it, in such full, clear, concise, and exact terms as to enable any person skilled in the art to which it pertains, or with which it is most nearly connected, to make and use the same and shall set forth the best mode contemplated by the inventor of carrying out his invention.

Claim 7 is rejected under 35 U.S.C. 112, second paragraph, as being indefinite for failing to particularly point out and distinctly claim the subject matter which applicant regards as the invention. Claim 7 recites the limitation "the food products and food delivery system" in step (b). There is insufficient antecedent basis for this limitation in the claim. However, for examination purposes this will be broadly interpreted as food products with any additional packaging.

Claims 8 and 9 are rejected under 35 U.S.C. 112, second paragraph, as being indefinite for failing to particularly point out and distinctly claim the subject matter which applicant regards as the invention. Claim 8 recites " a method of filling a container assembled as defined in claim 7". First, it is unclear if this claim 8 is dependent on claim 7 or if claim 8 is an independent claim. If claim 8 is an independent claim it is unclear what is meant by the "container assembled " (i.e. assembled up to step c or step g), and which, if any, of the structural limitation are to be considered (e.g. the opening is at the bottom of the container). If claim 8 is dependent on claim 7, then the preamble should be the same. For examination purposes, both scenarios will be addressed.

Claim Rejections - 35 USC § 103

The following is a quotation of 35 U.S.C. 103(a) which forms the basis for all obviousness rejections set forth in this Office action:

(a) A patent may not be obtained though the invention is not identically disclosed or described as set forth in section 102 of this title, if the differences between the subject matter sought to be patented and the prior art are such that the subject matter as a whole would have been obvious at the time the invention was made to a person having ordinary skill in the art to which said subject matter pertains. Patentability shall not be negated by the manner in which the invention was made.

Claim 7 is rejected under 35 U.S.C. 103(a) as being unpatentable over Yungblut (US 2396310) in view of Frost (US 5181649), Neusbaum (US 1657272), Leibson et al. (US 3423005),

Yungblut teaches a method of forming a reclosable container having a body and a cover from an open ended partially pre-glued and assembled container having a top (item 9), top side flaps (items 6 and 7), top front (item 10), bottom back (item 13) , and

bottom side flaps (item 11 and 12) wherein top side flaps are folded inward, the top and top front cover are attached to the front, a consumer items are inserted, the bottom side flaps are folded inward the bottom back is folded inward. (See Figures 1, 3,4, Column 3, lines 46- 63, Column 4, lines 6-55). Yungblut further teaches there may also be a bottom front flap, if that particular bottom seal is desired (Column 2, line 40-Column 3, line 10) Although Yungblut is silent in teaching food items and food delivery systems, it is well known to package these items in containers which are reclosable and similar to Yungblut.

Frost is relied on as evidence of the conventionality of providing food products and a delivery system (a tray) in a reclosable container (Column 4, lines 13-21, Figures 2 and 3).

Neusbaum is relied on as further evidence of the conventionality of providing food products (e.g. candy) and delivery systems (i.e. paper coated rolls of candy held within a casing) in a reclosable container (Page 1, lines 1-16, 62-97, Figures 1-5).

Leibson et al. are relied on also as further evidence of the conventionality of providing food products (bacon) and delivery systems (i.e. pouches) in a reclosable container (Abstract, Figures 1-6).

Therefore, it would have been obvious to modify the method of Yungblut and include food products and delivery systems since one would have been substituting one known conventional consumer item for another for the same purpose: package in a reclosable container.

Claims 8 and 9 are rejected under 35 U.S.C. 103(a) as being unpatentable over Yunglut (US 2396310) in view of Frost (US 5181649), Neusbaum (US 1657272), Leibson et al. (US 3423005) as applied to claim 7 above, further in view of Ringler et al. (US 2441445).

Regarding claim 8, Yungblut teaches the container is filled by conventional filling machines (Column 3, lines 45-58), but is silent in teaching the container is loaded progressively by pushing a plurality of food items into the container and the food items are held in an over wrapped elongated tray with a weakened area to facilitate folding the tray, as recited in claim 8, or loading by using a tool to touch and push each of the food items into the container simultaneously, as recited in claim 9.

With respect to the particular filling method of Yungblut, Ringer et al. are relied on as evidence of the conventional filling method for filling a reclosable container through the bottom end wherein items are progressively pushed into the container using a tool (Column 3, lines 27-43, Column 7, lines 12-70, Figures 3-6). Therefore, it would have been obvious to modify the method of Yungblut to include the step of progressively pushing a plurality of food items into the container using a tool, since Yungblut teaches filling may be done by a conventional filling method and one would have been substituting one known conventional filling method for another for the same purpose: filling reclosable containers.

With respect to the particular tray/over wrap configuration, although Yungblut is silent in teaching the particular item's packaging, Frost is relied on as evidence of the conventionality of a reclosable container comprising a plurality of food products

comprising a rectangular (i.e. elongated) tray, wherein a slit is provided in the tray to facilitate folding of the tray for dispensing of the products (Column 4, lines 13-21, Column 4, lines 31-47, Figures 2,3,9-12). Furthermore the tray also has an over wrap, a flexible bag (Column 6, lines 28-36, Figure 9).

Therefore, it would have been obvious to modify the method of Yungblut to include the plurality of food products in an over wrapped, elongated tray comprising a slit since one would have been substituting one known product for another in a reclosable container.

The alternative rejection of claims 8 and 9 if claim 8 is independent.

Claims 8 and 9 are rejected under 35 U.S.C. 103(a) as being unpatentable over Frost (US 5181649), Yunglut (US 2396310) and Ringler et al. (US 2441445).

Frost teaches loading a reclosable container with a plurality of food products comprising a rectangular (i.e. elongated) tray, wherein a slit is provided in the tray to facilitate folding of the tray for dispensing of the products (Column 4, lines 13-21, Column 4, lines 31-47, Figures 2,3,9-12). Furthermore the tray also has an over wrap, a flexible bag (Column 6, lines 28-36, Figure 9). However, Frost is silent in teaching the progressively pushing the plurality of food into an open end, using a tool as recited in claim 9, and closing off the open end after the plurality of food items is inserted as recited in claim 8.

Yungblut is relied on evidence of the conventional method of assembling and filling a reclosable container through an open bottom end. Yungblut teaches a method

of forming a reclosable container having a body and a cover from an open ended partially pre-glued and assembled container having a top (item 9), top side flaps (items 6 and 7), top front (item 10), bottom back (item 13), and bottom side flaps (item 11 and 12) wherein top side flaps are folded inward, the top and top front cover are attached to the front, a consumer items are inserted, the bottom side flaps are folded inward the bottom back is folded inward. (See Figures 1, 3,4, Column 3, lines 46- 63, Column 4, lines 6-55). Yungblut further teaches there may also be a bottom front flap, if that particular bottom seal is desired (Column 2, line 40-Column 3, line 10). Yungblut further teaches the container is filled by conventional filling machines (Column 3, lines 45-58).

Ringer et al. are relied on as evidence of the conventional filling method for filling a reclosable container through the bottom end wherein items are progressively pushed into the container using a tool (Column 3, lines 27-43, Column 7, lines 12-70, Figures 3-6).

Therefore, it would have been obvious to modify the method of Frost to include the step of progressively pushing a plurality of food items into the open end of container using a tool, and later sealing the open end since one would have been substituting one conventional method of filling reclosable containers for another.

Conclusion

The prior art made of record and not relied upon is considered pertinent to applicant's disclosure. Stone (5314114) and Schillinger (US 4513863) teach bottom

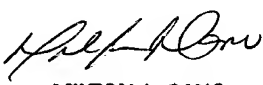
filled reclosable containers wherein the top is sealed first. Katsuji Shimada et al. (US 3311283) teach a reclosable container with an inner tray that has a slit for folding the tray. Lazerand (FR2596730) teaches elongated food trays with slits for folding in combination with a foldable lid.

Any inquiry concerning this communication or earlier communications from the examiner should be directed to Robert Madsen whose telephone number is (703)305-0068. The examiner can normally be reached on 7:00AM-3:30PM M-F.

If attempts to reach the examiner by telephone are unsuccessful, the examiner's supervisor, Milton Cano can be reached on (703)308-3959. The fax phone numbers for the organization where this application or proceeding is assigned are (703)872-9310 for regular communications and (703)872-9311 for After Final communications.

Any inquiry of a general nature or relating to the status of this application or proceeding should be directed to the receptionist whose telephone number is (703) 308-0061.

Robert Madsen
Examiner
Art Unit 1761
March 21, 2002


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3/22/02